

Brixen, Eugene

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Part-time employment

An odd lot worker capable of obtaining and performing only part-time or half-time work is not necessarily precluded from permanent total disability status. ...*In re Eugene Brixen*, BIIA Dec., 63,381 (1984)

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: EUGENE A. BRIXEN**) **DOCKET NO. 63,381**
2)
3 **CLAIM NO. H-273575**) **DECISION AND ORDER**
4

5 APPEARANCES:

6
7 Claimant, Eugene A. Brixen, by
8 David B. Vail

9
10 Employer, John R. Barnett,
11 None

12
13 Department of Labor and Industries, by
14 The Attorney General, per
15 Frank Rekasis and Larry C. Watters, Assistants
16

17 This is an appeal filed by the claimant on November 10, 1982, from an order of the
18 Department of Labor and Industries dated November 5, 1982, which adhered to the provisions of a
19 prior order closing the claim with permanent partial disability awards for his cervical spine,
20 dorsolumbar spine, both legs, left arm and psychiatric impairment. **REVERSED AND REMANDED.**
21

22 **DECISION**
23

24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
26 issued on October 7, 1982 in which the order of the Department dated November 5, 1982 was
27 sustained.
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29 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
30 no prejudicial error was committed and said rulings are hereby affirmed.
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32 The sole issue presented by this appeal is whether the claimant is a permanently totally
33 disabled worker as a result of his industrial injury of January 30, 1978. Some of the evidence is
34 summarized in the Proposed Decision and Order; however, we expand upon the evidentiary
35 discussion and reach a conclusion opposite to that contained therein.
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38 On January 30, 1978, Mr. Brixen was hit by a falling snag (or dead tree) during his course of
39 employment. His injuries included the following: A compression fracture of the twelfth dorsal
40 vertebra; a transverse process fracture of the third lumbar vertebra; the aggravation of a previously
41 asymptomatic spondylosis into a first degree spondylolisthesis at the spinal interspace between the
42 fifth lumbar and first sacral vertebra; multiple fractures of the ribs in the left chest; fracture of the left
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1 scapula; compound spiral fracture of the left tibia and fibula; traumatic injury to both knees
2 (including the aggravation of a pre-existing asymptomatic left knee condition; an internal right hand
3 injury; and ulnar neuropathy in the left arm and hand. By the time the claim was ultimately closed
4 on November 5, 1982, Mr. Brixen had undergone six surgeries and exhibited residuals of several
5 conditions including lumbar disc degeneration with hypertrophic changes in the lumbar spine, the
6 aggravation of pre-existing asymptomatic cervical disc degeneration, chronic cervical and lumbar
7 strains, chondromalacia in the knees, the closure of a large hole in the left leg by a skin graft, and a
8 psychiatric condition.
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13 On November 5, 1982, the Department issued its order closing the claim with awards for
14 permanent partial disability for conditions in his neck, low back, both legs, left arm, and for
15 impairment of mental health.
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18 Many years before his January 30, 1978 injury, Mr. Brixen had injured his left knee. That
19 injury required him to undergo surgery on ligaments performed by a Dr. Brown in Spokane. Mr.
20 Brixen testified that he was off work for some eleven months following that injury and that for two
21 years thereafter, he had performed physically less demanding jobs such as truck driving rather than
22 his customary logging work.
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25 In 1975, the claimant cut his left hand with a chain saw. This injury required the claimant to
26 lose two months from work and the claim was ultimately closed with a permanent partial disability
27 award.
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30 It is well established in the law of this state that if a person is impaired by a physical or
31 mental condition which pre-existed the occurrence of an industrial injury, and later is prevented
32 from return- ing to gainful employment because of the added or combined effects of a later
33 occurring industrial injury, the worker is then entitled to compensation as a permanently totally
34 disabled worker. Wendt v. Department of Labor and Industries, 18 Wn. App. 674 (1977). The prior
35 injury or disability is viewed not as the cause of the total disability, but merely a condition upon
36 which the subsequent injury combined to cause permanent total disability. See Erickson v.
37 Department of Labor and Industries, 48 Wn. 2d 458 (1956) and Miller v. Department of Labor and
38 Industries, 200 Wash. 674 (1939).
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43 The claimant is also entitled, when the issue of his capacity for employment is being
44 determined, to a consideration of certain socio- economic factors: age, level of education, history of
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1 prior employment, and the feasibility of vocational retraining. Pacific Car and Foundry Co. v. Coby,
2 5 Wn. App. 547 (1971).
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4 The court in Kuhnle v. Department of Labor and Industries, 12 Wn. 2d 191, 196 (1942), had
5 occasion to interpret the predecessor of RCW 51.08.160, defining permanent total disability. That
6 definition now reads materially the same as it did then. The Kuhnle court pointed out that
7 permanent total disability, as defined by the statute, does not require a workman to be absolutely
8 helpless. Furthermore, Kuhnle pioneered the rule that if an accident leaves the workman in such a
9 condition that he can no longer follow his previous occupation, or any other similar occupation, and
10 is fitted only to perform "odd jobs" or special work, not generally available, the burden shifts to the
11 Department to show that there is such special work that he can in fact obtain.
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13 Primarily through the testimony of Dr. Wayne W. Zimmerman and Frank C. Swinehart, Mr.
14 Brixen has presented convincing evidence which establishes that, on the closing date, the only type
15 of work he was capable of obtaining and performing squarely fits the category of "odd lot"
16 employment.
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18 Franklin M. Dare, a vocational rehabilitation counselor employed by the Department, testified
19 that part-time or half-time work, within the claimant's physical capabilities, was available to Mr.
20 Brixen.
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22 In our opinion, the phrase "or other condition permanently incapacitating the worker from
23 performing any work at any gainful occupation", found in RCW 51.08.160, does not necessarily
24 preclude an injured worker from permanent total disability status when he is capable only of
25 obtaining and performing part-time or half-time work.
26

27 We conclude that the Department has failed to carry its required burden of showing that "odd
28 lot" or special employment, suitable to this claimant's very substantial residual disability, is in fact
29 available to him. Allen v. Department of Labor and Industries, 16 Wn. App. 692, 693 (1977).
30

31 The proposed findings, conclusions and order are hereby stricken and replaced by those
32 that follow.
33

34 **FINDINGS OF FACT**

- 35 1. On February 6, 1978, the Department of Labor and Industries received
36 an accident report in which it was alleged that Eugene A. Brixen, the
37 claimant herein, had sustained an industrial injury on January 30, 1978
38 while in the course of his employment with John R. Barnett. The claim
39 was accepted, medical treatment provided, and time-loss compensation
40 was paid. On August 4, 1982, the department issued an order closing
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1 the claim with permanent partial disability awards of 25% as compared
2 to total bodily impairment for cervical and dorsolumbar impairment (10%
3 for cervical and 15% for dorsolumbar), 10% as compared to total bodily
4 impairment for psychiatric impairment, 15% of the amputation value of
5 the left leg at or above the knee with functional stump, 18% of the
6 amputation value of the right leg at or above the knee with functional
7 stump, 5% of the amputation value of the left arm at or above the deltoid
8 insertion or by disarticulation at the shoulder. On September 17, 1982,
9 the claimant filed a notice of appeal with the Board of Industrial
10 Insurance Appeals. On September 27, 1982, the Department issued an
11 order holding in abeyance its previous order dated August 4, 1982,
12 pending further investigation. On September 28, 1982, this Board
13 issued its order returning the case to the Department for further action.
14 On November 5, 1982, the Department issued an order adhering to the
15 provisions of its previous order dated August 4, 1982. On November 10,
16 1982, the claimant filed a notice of appeal with this Board. On
17 November 30, 1982, the Board issued its order granting the appeal,
18 assigning it Docket No. 63,381, and directing that proceedings be held
19 on the issue contained therein.

- 20
21 2. On January 30, 1978, the claimant was injured during the course of
22 employment when he was hit by a falling dead snag. As a result he
23 sustained the following injuries: a compression fracture of the twelfth
24 dorsal vertebra; a fracture of the transverse process of the third lumbar
25 vertebra; the aggravation of a previously asymptomatic spondylosis into
26 a first degree spondylolisthesis at the interspace between the fifth
27 lumbar and first sacral vertebrae; multiple fractures of the ribs in the left
28 chest; fracture of the left scapula; compound spiral fracture of the left
29 tibia and fibula; internal injuries to both knees, including the aggravation
30 of the pre-existing asymptomatic left knee condition; internal injuries to
31 the right hand, requiring exploratory surgery; ulnar neuropathy to the left
32 arm and hand; lumbar disc degeneration with hypertrophic changes in
33 the lumbar spine, the aggravation of a pre-existing, asymptomatic
34 cervical disc degeneration; a condition diagnosed as chondromalacia in
35 the knees; the closure of a large hole in the left leg by a skin graft; a
36 psychiatric condition; and some six surgeries in treatment of the
37 foregoing.
- 38 3. In the early 1960's, the claimant had sustained an injury to his left knee
39 which required surgical repair. The injury kept the claimant off work for
40 some eleven months, and required the claimant to seek lighter
41 employment for the ensuing two years. The left knee had returned to an
42 asymptomatic condition and remained as such until aggravated by the
43 claimant's industrial injury of January 30, 1978.
- 44 4. In 1975, the claimant sustained an industrial injury involving a cut in his
45 left hand with a chain saw which prevented the claimant from working
46 for approximately two months. This claim was ultimately closed with a
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1 permanent partial disability award equal to 20% of the amputation value
2 of the arm at the wrist.

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4 5. The claimant is fifty-three years of age, has a high school education,
5 and has a lifetime history of employment primarily limited to manual
6 labor. On November 5, 1982, the claimant was not a suitable candidate
7 for vocational rehabilitation.

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9 6. On November 5, 1982, as a result of his industrial injury of January 30,
10 1978, the claimant had among others the following residual conditions:
11 healed compression of the twelfth dorsal and of the transverse process
12 of the third lumbar vertebra; the aggravation of a pre-existing
13 asymptomatic spondylosis into a first degree spondylolisthesis at the
14 interspace between the fifth lumbar and the first sacral vertebra; healed
15 multiple fractures of the ribs in the left chest; healed fracture of the left
16 scapula; healed compound spiral fractures of the left tibia and fibula,
17 which had required surgical corrections; internal injury to both knees,
18 including the aggravation of a pre-existing asymptomatic left knee
19 condition, requiring three surgeries including a tibia transplant; internal
20 injury to the right hand requiring exploratory surgery; ulnar neuropathy to
21 the left arm and hand; lumbar disc degeneration with hypertrophic
22 changes in the lumbar spine, the aggravation of pre-existing, minor
23 asymptomatic cervical disc degeneration; early chondromalacia in the
24 knees; the closure of a large hole in the left leg by a skin graft; chronic
25 cervical and lumbar strains; and a psychiatric condition. All of these
26 conditions were fixed and further treatment was not indicated. On
27 November 5, 1982, the claimant's residual permanent partial disability,
28 attributable to each of these conditions standing alone, was as follows:
29 25% as compared to total bodily impairment for the cervical and
30 dorsolumbar conditions, consisting of 10% for cervical and 15% for
31 dorsolumbar; 15% of the amputation value of the left leg at or above the
32 knee with functional stump; 18% of the amputation value of the right leg
33 at or above the knee with functional stump; 5% of the amputation value
34 of the left arm at or above the deltoid insertion or by disarticulation at the
35 shoulder; and 10% as compared to total bodily impairment for the
36 psychiatric condition. Standing alone, the foregoing conditions did not
37 permanently prevent the claimant from performing a full-time gainful
38 occupation on a reasonably continuous basis.

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40 7. As of November 5, 1982, when the claimant's above-described
41 permanent impairments attributable to his injury of January 30, 1978,
42 were superimposed upon and combined with his permanent impairment
43 resulting from his left knee injury in the early 1960's, and the chain saw
44 injury to his left hand in 1975, and when considered with the factors of
45 the claimant's age, education, history of employment, and poor
46 retraining prognosis, the claimant was permanently prevented from
47 obtaining and performing any gainful occupation on a reasonably
continuous basis other than that of an "odd lot" classification.

1 8. As of November 5, 1982, gainful employment commensurate with the
2 claimant's qualifications and abilities, and in keeping with his numerous
3 injury-caused impairment, was not available to him.

4
5 **CONCLUSIONS OF LAW**

- 6 1. This Board has jurisdiction of the subject matter and the parties to this
7 appeal.
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9 2. As of November 5, 1982, as a proximate result of his industrial injury of
10 January 30, 1978, the claimant was a permanently totally disabled
11 worker within the definition and contemplation of RCW 51.08.160.
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13 3. The order of the Department of Labor and Industries issued November
14 5, 1982, which adhered to the provisions of a previous order dated
15 August 4, 1982, closing the claim with permanent partial disability
16 awards equal to 25% for cervical and dorsolumbar impairment, 15% of
17 the amputation value of the left leg at or above the knee with functional
18 stump, 18% of the amputation value of the right leg at or above the knee
19 with functional stump, 5% of the amputation value of the left arm at or
20 above the deltoid insertion or by disarticulation at the shoulder, and 10%
21 for psychiatric impairment, is incorrect, should be reversed, and the
22 claim remanded to the Department with direction to accord the claimant
23 the status of a permanently totally disabled worker, effective November
24 5, 1982, with all of the benefits incident with that status.

25 It is so ORDERED.

26 Dated this 3rd day of January, 1984.

27 BOARD OF INDUSTRIAL INSURANCE APPEALS

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29 /s/ _____
30 MICHAEL L. HALL Chairman

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32 /s/ _____
33 FRANK E. FENNERTY, JR. Member
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